(5)

No. 86-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CPT JOHN R. VAN DRASEK, U.S.M.C. (RET.),
Petitioner,

v.

JOHN F. LEHMAN, JR.,
SECRETARY OF THE NAVY,
CHAPMAN COX,
ASSISTANT SECRETARY OF THE NAVY
FOR MANPOWER AND RESERVE AFFAIRS,
AND
THE UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

1. Whether military personnel should be denied judicial review when seeking only equitable relief for Constitutional, statutory, or regulatory violations committed by their superior officers.

LIST OF PARTIES

The petitioner is Captain John R. Van Drasek, U.S.M.C. (Ret.). The respondents are The Honorable John F. Lehman, Jr., Secretary of the Navy, Chapman Cox, Assistant Secretary of the Navy for Manpower and Reserve Affairs, and The United States of America.

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OPINIONS BELOW

The United States Court of Appeals for the Federal Circuit affirmed the judgment of the United States District Court for the District of Columbia without written opinion but by adoption of the trial court opinion. *See Van Drasek v. Lehman, et al., Petition for a Writ of Certiorari, Appendix at A-1, No. 86-319 (U.S. Sup. Ct.) [hereinafter, "Cert. Pet. App. at ____"].* The opinion of the Federal Circuit was rendered on January 23, 1986, and a *Petition for Rehearing with Suggestion for Rehearing En Banc* was denied on April 1, 1986.

The opinion of the trial court of December 6, 1983, is unreported and was reproduced and attached to the *Petition for a Writ of Certiorari* in the instant case. *See Cert. Pet. App. at A-2 to A-8.* Appeal was first taken to the United States Court of Appeals for the District of Columbia Circuit. That court transferred the appeal to the United States Court of Appeals for the Federal Circuit, pursuant to 28 U.S.C. Section 1631 (1982), under the authority of the Federal Courts Improvement Act, 28 U.S.C. Section 1295(a)(2) (1982). *Van Drasek v. Lehman, et al.*, 762 F.2d 1065, 1067 1072 (D.C. Cir. 1985). That opinion was also reproduced and attached to the *Petition for a Writ of Certiorari* in the instant case. *See Cert. Pet. App. at A-9 to A-18.*

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered the judgment in this case on January 23, 1986. Petitioner's motion for rehearing was denied on April 1, 1986. The jurisdiction of this Court is invoked pursuant to 18 U.S.C. Section 1254(1) and Rule 17 of the United States Supreme Court Rules.

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CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment 1, provides, in part, that:

> Congress shall make no law . . . abridging the freedom of speech . . .; or of the right of people to . . . . petition the government for redress of grievances.

2. United States Constitution, Amendment 5, provides in pertinent part:

> No person shall . . . be deprived of life, liberty, and property without due process of law. . . .

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STATEMENT

Petitioner John Van Drasek enlisted in the United States Marine Corps in 1965 and served from 1966-68 in combat leadership positions in Vietnam, receiving the Bronze Star Medal, with "V" Device for Distinguished Combat Service. *A R, Vol. IV, pp. 199-200.*[1] After being seriously wounded and a lengthy recovery, the Petitioner completed a college degree and was commissioned as a Second Lieutenant, always being promoted to the next highest rank in the shortest time possible, until his promotion to Captain. (JA 84).[2]

On June 17, 1983, Petitioner, having been twice passed over for promotion to Major, instituted an action in the United States District Court for the District of Columbia challenging his involuntary separation from the Marines pursuant to 10 U.S.C. Section 632 (1982). *Cert. Pet. App. at A-2.* Petitioner's suit alleged that his First and Fifth Amendment rights were violated because of complaints he made, pursant to Article 138, Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. Section 938 (1982), against his superior commanding officer. The Article 138 Complaint had alleged that Petitioner's superior commanding officer, COL M.T. Cooper, had denied equal employment opportunity to women Marines, and had exerted command influence in courts-martial and administrative discharge boards ("ADB"). *Cert. Pet. App. at A-2.* Petitioner's Federal lawsuit also alleged that his failure to be promoted, and subsequent forced separation from the Marines, was improper and retaliatory, resulting from his filing the Article 138 Complaint. *Id.* at A-2.

From June 28, 1981 to September 28, 1982, Petitioner, then a Captain, served at the Officer Candidate School ("OCS"), Marine Corps Development and Education Command ("MCDEC"), in Quantico, Virginia, as Director of the Non-

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[1] "AR" refers to the Administrative Record (in four volumes) before the Board for Correction of Naval Records ("BCNR").

[2] "JA" refers to the Joint Appendix filed in the United States Court of Appeals for the Federal Circuit.

commissioned Officers Leadership School ("NCOLS"). In October, 1981, Petitioner challenged his commanding officer, COL Cooper, in regard to the exclusion of pregnant Marines from courses at NCOLS. *A R, Vol. IV, pp. 241-250.*[3] A few weeks later, COL Cooper filed a fitness report on the Petitioner for the period June 23, 1981 to November 30, 1981. *Cert. Pet. App. at A-3.* The fitness report rated the Petitioner "excellent," the second highest rating, in every observed category. *Id.* at A-3. Thus, for the first time since 1974, Petitioner was rated without a single "outstanding," the highest possible rating. (JA 84). Such a bright line report is commonly known among Marine Corps officers as a "killer" fitness report. *A R, Vol. IV, p. 331.* It was this fitness report which was the last entry in Petitioner's Service Record Book ("SRB") and Fitness Report Brief that was before the April, 1982, Major Selection Board, which passed him over for promotion to Major the first time. This was Petitioner's first promotion passover in his military career. *A R, Vol. IV, pp. 305-307;* (JA 6).

On May 18, 1982, through proposed MCDEC Order 1510.10 for the NCOLS 1982-83 academic year, Petitioner formally recommended against discriminatory treatment of pregnant Marines. *App. 20-21.*[4] Shortly thereafter, COL Cooper issued a second fitness report on the Petitioner which covered the period December 1, 1981 to May 31, 1982. *Cert. Pet. App. at A-3.* This report contained mostly marks of "excellent" and several of "outstanding." However, it was this report which appeared before the second Major Selection Board, in March, 1983, which failed to select Petitioner for Major, ensuring his mandatory separation form the Marines pursuant to 10 U.S.C. Section 632 (1982).

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[3] In February, 1982, COL Cooper ordered the OCS's *Standard Operating Procedures,* requiring use of "male candidate[s]" for parade honor billets for all but one staff position. (App. 20-21) ("App." refers to the Appendix of Pertinent Statutes and Regulations in Petitioner's Brief in the Federal Circuit.) Cooper's order was in direct contravention of the *Marine Corps Equal Opportunity Manual, MCO P5354.1.*

[4] In response, MCDEC Order 1510.10D, App. 29-30, barring pregnant Marines from NCOLS, in violation of MCO P5354.1, *supra,* para. 3009, was issued on October 20, 1982. *See* MCDEC Order 1510.10D, para. 4a(4).

On July 16, 1982, the Petitioner, while serving a six-month term on an ADB, joined a unanimous vote in the *Frederick* case to retain a Marine despite an alleged drug abuse problem. *Cert. Pet. App. at A-3.* Thereafter, on August 6, 1982, COL Cooper, without authority, removed Petitioner from a case being reviewed by the ADB.[5] *Cert. Pet. App. at A-3.* On August 10, 1982, Petitioner voted for an Honorable Discharge in the *North* case, which was reviewed by the same ADB for drug and misconduct charges. *Cert. Pet. App. at A-3.* On the same day, following a lengthy discussion with COL Cooper about the *North* case, Petitioner was ordered transferred from OCS, which was Cooper's command.[6] Although he cancelled these orders within a few days, Cooper finally succeeded in having Petitioner transferred from OCS on September 28, 1982, on the ground that he was medically unfit, *Cert. Pet. App. at A-3,*[7] following

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[5] In his April 4, 1983, Memorandum to the Respondents, General D.M. Twomey, Petitioner's commanding general who was responsible for review of the Petitioner's Article 138 Complaint, noted that Petitioner "did not participate in an [ADB] proceeding from which he had not been properly excused by [COL Cooper] . . . and . . . the officer nominated to replace him on the [ADB] had participated in the board's consideration of the case without being assigned by an authorized officer. . . . [T]he proceeding was set aside and referred to another [ADB]." (JA 75).

[6] On July 2, 1982, General Twomey assigned Petitioner to ADB duty for a period of six months, beginning on July 1, 1982, and ending on December 31. *See* Art. 138 Pkg., p. 87. The July 2 order specifically states that only "the convening authority"—Twomey—could relieve or excuse an officer assigned to ADB duty. *Id.* Thus, Cooper's actions in removing Petitioner from an ADB—and, perhaps, even his transfer—were in clear violation of Twomey's written orders of July 2, 1982.

[7] It has been unrebutted that Cooper's subordinates who gave statements during the Article 138 Complaint investigation which supported Cooper and cast aspersions on the Petitioner's character, had equally or more serious medical problems and were allowed to remain at OCS by Cooper.

Petitioner's accident while parachuting, an activity authorized by Cooper. *AR, Vol. III, p. 57.*[8] The OCS assignment under Cooper was critical for Petitioner's promotion to Major. *AR, Vol. IV, pp. 252-253.*

During the investigation of the Article 138 Complaint, COL Cooper stated that he had considered transferring Petitioner due to dissatisfaction with his performance in the Spring of 1982. *Cert. Pet. App. at A-4.* This was the same period of time that Petitioner and Cooper had their conflict over the treatment of women Marines at NCOLS, *id.* at A-4, and Petitioner's Fitness Report ratings of "excellent" by Cooper. *AR, Vol. IV, pp. 37-42.* Thus, it is inconsistent for Cooper to have contemplated transferring Petitioner for unsatisfactory performance, unless an "excellent" rating is indeed a "killer" Fitness Report. The contention that an "excellent" Fitness Report is a "killer" report has been raised by Petitioner at all levels of the case below, *see AR, Vol. IV, p. 331,* and has never been rebutted by the Respondents. Moreover, it cannot be missed that Petitioner proposed that Cooper not exclude pregnant Marines from NCOLS on May 18, 1982; that shortly thereafter Cooper wrote the second Fitness Report which resulted in Petitioner's mandatory separation; that Petitioner was transferred from Cooper's command on September 28, 1982; and that Cooper issued an order on October 20, 1982, which did, in fact, exclude pregnant Marines from NCOLS in violation of Department of Defense and the Respondents' own policies regarding equal employment opportunity for women in the military.

[8] Petitioner was subsequently retired as 70% disabled, largely as a result of combat and parachuting injuries, after the Federal Circuit rendered its decision in this case. It is worth noting that the Respondents never moved to separate Petitioner for any alleged disability *until after* Judges Parker and Richey more or less forced the Respondents to agree to stay the Petitioner's involuntary separation caused by the two promotion passovers.

Pursuant to Article 138 of the UCMJ, 10 U.S.C. Section 938 (1982), Naval Regulations (NAVREGS),[9] and the Manual of the Judge Advocate General of the Navy (JAGMAN),[10] Petitioner initiated a complaint against COL Cooper by formal letters dated September 29 and October 8, 1982. *Cert. Pet. App. at A-3.* He alleged that Cooper had exerted improper command influence on OCS personnel with regard to their testifying on behalf of Marines who were the subjects of judicial and administrative discharge actions and with regard to their voting as members of courts-martial and ADBs. He also alleged that his removal from the ADB by Cooper, and his transfer from Cooper's command at OCS, had been in retaliation for his part in the ADB decisions in the *North* and *Frederick* cases. *Id.* at A-3.

The Petitioner's Article 138 Complaint was investigated by Colonel Curtis G. Lawson, who was appointed by General Twomey, and who issued a report dated February 28, 1983. *Cert. Pet. App. at A-4;* (JA 51-72). Although he concluded that COL Cooper did not commit the wrongs alleged, in contradiction to that conclusion COL Lawson found that a number of Cooper's subordinates at OCS felt that they were subject to pressure with regard to testifying and voting in courts-martial and ADB proceedings. *Cert. Pet. App. at A-4.* In addition, COL Lawson also accepted Cooper's explanation regarding Petitioner's transfer from Cooper's command. In a number of regards, Lawson's investigative findings did not square with his conclusions, particularly that the Petitioner did not sustain his Article 138 Complaint against COL Cooper. For instance, while concluding that Cooper had not been involved in the exertion of command influence in courts-martial and ADBs, Lawson's investigation found, in part, that:

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[9] Lodged with the Court as suplements to the record are Chapter XI, Manual of the Judge Advocate General of the Navy, and United States Navy Regulations (1973), sections 1101-1106, 1109, 1139, 1201, which implement Article 138, UCMJ, as enacted by Congress and codified at 10 U.S.C. Section 938 (1982). As noted above, these regulations are hereinafter referred to as "NAVREGS" and "JAGMAN."

[10] *See* footnote 9.

(1) the *command* was highly sensitive to adverse rulings on *command* initiated courts and boards. (emphasis added)[11]

(2) this command sensitivity led to questioning of OCS appointed members of courts and boards to determine the rationale for the adverse rulings.

(3) in this highly sensitized situation, *perceptions*[12] as to motives for the command concern were misconstrued by certain members of the command. (emphasis added)

(4) there probably was an imprecise relay (more stringent interpretation) of Colonel Cooper's guidance concerning "favorable testimony" in the instances of Lieutenant Colonel Houle to Company C and Major Labar to the S-3 section.[13] However, even these interpretations were not sufficient to meet an Article 138 complaint of wrongs against Colonel Cooper.

(5) at no time did Colonel Cooper threaten adverse career implications if votes and/or testimony were not in keeping with command desires.

(6) [Petitioner] . . ., Captain Saul, Captain Becker, and others believe that *the incessant command interest on votes and testimony* has become a detriment to honest testimony and voting in the command and a

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[11] Use of the word "command" by COL Lawson in the Article 138 investigation refers to COL Cooper's command of the Officer Candidate School.

[12] In regard to "perceptions" by COL Cooper's immediate subordinates of command influence, the United States Court of Military Appeals has held that, "the apparent existence of 'command control' . . . is as much to be condemned as its actual existence." *United States v. Johnson*, 14 U.S.C.M.A. 548, 551 (CMA 1964).

[13] It should be noted that Houle and Labar were Cooper's immediate subordinates. They gave written statements to COL Lawson during the Article 138 investigation that attempted to shift responsibility away from Cooper while, at the same time, casting personal aspersions against the character of the Petitioner.

threat to [their] careers. (emphasis added).[14]

(7) the command is incorrect in approaching OCS members of courts/boards for information relative to adverse rulings on OCS initiated actions.

(JA 71-72)

COL Lawson's conclusions are even more puzzling upon examination of his recommendations regarding command influence and Petitioner's Article 138 Complaint. Lawson's final recommendation implicitly recognized the existence of the problem in Cooper's command, while at the same time denied that such was sufficient to sustain Petitioner's Article 138 Complaint: "[I]n the sense of Article 138, . . . there is no basis for [Petitioner's] . . . complaint of wrongs, as he has suffered no personal detriment as a result of command interest in courts and boards action on OCS initiated cases." (JA 72).[15] Two other recommendations by Lawson make the issue even more constrained in logic:

(1) That OCS should address any Command interest on court/board actions and results to the Staff Judge Advocate rather than OCS members of the courts/boards.

(2) That OCS, as well as other Commands of MCDEC, be provided professional legal instruction for all OICs and Commanding Officers relative to

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[14] *See* footnote 12, *ante*.

[15] This recommendation defies the clear statement in Respondents' own regulations. NAVREGS 1106.1 states that "[i]f any person in the naval service considers himself oppressed by his superior, *or observes in him any misconduct, he . . . shall report such oppression or misconduct to the proper authority.*" (emphasis added). Moreover, NAVREGS 1106.1 would seem to implement the straightforward intent of Congress in 10 U.S.C. Section 5947 (1982): "All commanding officers and others in authority in the naval service are required to . . . guard against and suppress all dissolute and immoral practics, . . . and to take all necessary and proper measures, under the laws, regulations, and customs of the naval service, to promote and safeguard the morale, the physical well-being and the general welfare of the officers and enlisted persons under their command or charge."

> proper and improper testimony and the limits of guidance concerning knowledge of facts versus personal belief and opinion.

(JA 72).

General Twomey's response to the complaint and investigation was to direct that proper practices be followed in staffing ADBs, that Cooper make clear to his subordinates the absence of improper influence on administrative and judicial actions, and that Cooper be advised of the inappropriate treatment of women Marines at the NCOLS. *Cert. Pet. App. at A-4;* (JA 73-77). The Respondents approved this disposition on May 17, 1983. *Cert. Pet. App. at A-4* (JA 81-82). Despite explicit findings that command influence existed in Cooper's command and that women Marines at NCOLS were not treated in accord with Navy and Marine Corps policy, neither Twomey nor the respondents overruled Lawson's conclusions that Petitioner had failed to sustain the allegations of his Article 138 Complaint.

In his initial Article 138 Complaint, Petitioner stated that:

> During a commanding officer's staff meeting in February 1982, the [command influence] issue was first addressed by Colonel Cooper. It seems that during that period certain judicial actions instigated by [Cooper] . . . were being adjudicated by the MCDEC Staff Judge Advocate's Office. When the results of these actions reached [Cooper] . . ., [he] seemed very displeased with them and especially with the fact that members of his command, in some cases, had given credible character testimony on behalf of the defendants. Colonel Cooper's displeasure was further amplified by his message to his commanders and staff, of which I was a member at that time: Colonel Cooper indicated that he believed that military [lawyers] . . . manipulated the facts of cases to suit their own intentions and that for anyone to give credible character testimony in these cases served only to undermine the system of justice and to help the accused, "who were obviously guilty of something or they wouldn't be there in the first place," win the case. . . . During the weeks that followed, I was informed that certain members of the command had been counseled

> by the Commanding Officer, Headquarters and Service Company (Major R.M. Patten), and Colonel Cooper as to their naivete, poor judgment, and lack of command loyalty regarding their testimony and/or voting actions on disciplinary or administrative board proceedings. I was professionally appalled to think that command pressure of that magnitude would be brought to bear in matters of this type.
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> . . . Upon my return from annual leave I was informed that during my absence at an S-3 Section meeting on 20 July 1982, the word was passed that those who participate in any way in an OCS-initiated administrative board or court-martial action had better be guarded about what they say or how they vote becuase it could affect their careers in the Corps.
>
> . . . [O]n 9 August 1982, I was called in by the Executive Officer, [of OCS] . . . [Major J.P. Rigoulot], for approximately thirty minutes of intense questioning which resulted in an indictment of my professional judgment including implications as to the "obvious" lack of good judgment and loyalty on my part evidenced in the record of my vote to "retain" Sergeant Frederick who was the subject of my last administrative discharge action. Two days later I was relieved in writing from all further responsibilities as the command's representative on [ADBs]. . . . The following day I received orders transferring me out of the command.
>
> On . . . the 13th of August [1982], as I was departing the command, I met with Colonel Cooper and addressed the issue of the reason for my transfer at this time. Colonel Cooper admitted his displeasure with me concerning my vote on the [ADB]. . . . Unbeknownst to me at that time, but later confirmed, was the fact that another member of the command was severely chastised by the Command Officer, Headquarters Company, and the Sergeant Major, [of OCS] . . . , [Sergeant Major L.E. Wood], for his testimony of fact in the same board action. Although I was being retained at [OCS], I was not to be reinstated as the command's representative for [ADBs].

> *. . . I believe that actions of the type described above are thoroughly in conflict with the honor and justice system which the Corps is based on and serve only to make complacent cowards out of would-be professional Marines. When the very rights that the Armed Forces are established to preserve are hampered by undue influence from over-zealous commanders, we have defeated the very reason for our existence.* (emphasis added).

(JA 43-45.)

The Petitioner's contentions were fully supported by a number of the members of Cooper's command whose sworn statements were taken by COL Lawson during the investigation of Petitioner's Article 138 Complaint. In two statements dated on or about January 7 and February 16, 1983, Captain John W. Saul, a member of Cooper's staff at OCS, said that:

> On July 20, during a S-3 section meeting conducted by Major T.D. LABAR, immediately following an OCS staff meeting conducted by Colonel . . . COOPER, the other primary members of the S-3, and I were given some very unusual directions from Major LABAR. The directions came in the form of advice regarding our careers in the Marine Corps. Major LABAR indicated that we should not give credible testimony for our subordinates if our command was initiating an administrative or judicial action against them if we valued our careers. To impress the point upon us he cited a situation where another Marine Corps officer recently testified on behalf of one of his former troops at MCDEC and immediately fell into disfavor with his command. The inference was that Colonel COOPER didn't want any member of his command giving credible testimony in UCMJ adjudications, especially those initiated by OCS.

These directions by Major LABAR were shocking but not unexpected since they were consistent with the general repressiveness at OCS and were in keeping with the multitude of other negative policies initiated by Colonel COOPER which adversely affected the morale of OCS.

> . . . A conversation with Capt. C.E. HINDENBURG revealed that [the Petitioner's] recent transfer from OCS was due to the fact that [the Petitioner] failed to vote in accordance with the wishes of Colonel COOPER at an [ADB] of which he was a member. Capt. HINDENBURG stated that [Petitioner's] failure to vote correctly was 'the straw that broke the camel's back' and was responsible for his transfer. . . .[16]

Article 138 Package, p. 138.

Captain Saul made it very clear in his statements that people under Cooper's command were afraid to give statements during the Article 138 Complaint investigation because they "fear for their careers if they do not whole-heartedly support Colonel Cooper." *Id.* at pp. 139-140. Captain Saul, under oath, went on to state that:

> The Marines at OCS are correct to fear for their careers should they make a statement concerning undue command pressure. It is not misinterpretation of the commander's guidance by his field grade officers as some would have others believe.[17] It is incomprehensible that field grade officers would pass along instructions of this kind to their subordinates

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[16] The statement given by Capt. Hindenburg to COL Lawson during the Article 138 Complaint investigation discusses only the Petitioner's removal from ADB duty, effective August 13, 1982. *See Article 138 Package*, p. 157. Hindenburg's statement is dated November 23, 1982, and was originally given to Colonel Cooper on November 23, 1982, and later incorporated by Lawson into the investigation on February 7, 1983. It is significant to note that despite the fact of Captain Saul's accusations about Captain Hindenburg on January 7, and again on February 16, 1983, Hindenburg never denied Saul's contentions about Petitioner's transfer from OCS as it was related to Saul by Hindenburg. Moreover, there is no evidence in the record that COL Lawson ever asked Captain Hindenburg about Captain Saul's accusations as to the reasons for Petitioner's transfer from OCS.

[17] This is precisely the conclusion reached by COL Lawson after investigating Petitioner's Article 138 Complaint. *See* (JA 71-72). Interestingly, Captain Saul made his correct observations two weeks prior to COL Lawson's final investigative report for General Twomey.

> out of blind loyalty to Colonel Cooper, but from all indications they did so from fear that their careers would be damaged should they not comply with Colonel Cooper's guidance. They relayed these instructions [to their subordinates] because it was part of their survival strategy at OCS.

Article 138 Package, p. 140. Captain Saul then went on to detail several instances of his "knowledge of events at OCS relative to undue command pressure and the fears of many Marines at OCS who declined to make statements concerning Colonel Cooper's administration [of his command]. . . . *Id.* at 140. None of Captain Saul's allegations was rebutted in any substantial manner by COL Lawson's investigative conclusions, despite their direct relationship to the claims made by the Petitioner in his Article 138 Complaint.

On February 19, 1983, Captain Kimberly L. Becker gave COL Lawson a sworn statement which she had previously submitted in early-January 1983. Captain Becker stated, in part, that:

> . . . [C]ommand pressure to discharge OCS Marines put before board actions appeared to be exerted on OCS personnel assigned to testify or adjudicate at these actions.
>
> . . . Maj. J.P. RIGOULOT, during February 1982, briefed all available Academics personnel on the information passed on at a meeting of field grade officers and Col. COOPER. The Major stated that Col. COOPER was extremely displeased with 1st Lt. C.G. WRIGHT's favorable character testimony in the recent court-martial of an OCS Marine. Maj. RIGOULOT further said the colonel considered it poor judgment to testify, in any capacity, on behalf of anyone before an adverse action. Moreover, the major said Col. COOPER wanted those field grade officers who had met with him to relay to those personnel under their purview his 'concern' at the outcome of the court-martial and with Lt. WRIGHT's testimony, and that in the future, OCS personnel testifying at or serving on any board action should weigh carefully their statements/actions with the command's intended objective. . . .

> . . . Word of 1st Lt. WRIGHT's counseling by Col. COOPER spread quickly around the command, primarily owing to 1st Lt. WRIGHT's answers to queries. His admissions, coupled with information passed [down] that same week [by the command] . . . caused concerned discussion (at least among company-grade officers) of possible repercussions on their fitness reports should their ethical obligations supercede the 'discharge dictum'. . . .
>
> . . . Due to the apparent command scrutiny in punitive/administrative discharge actions against OCS personnel, I was apprehensive in sitting on administrative discharge boards to which I was assigned. . . . I . . . request[ed] dismissal from OCS cases. My concern was that my fitness reports might suffer should I vote for retention of an OCS Marine. . .
>
> . . . On the day [the Petitioner] addressed with Col. COOPER the issue of his transfer [from OCS], various OCS Marines were aware the conversation was transpiring since the 'cause' for transfer was generally thought to be the [Petitioner's] voting contrary to the colonel's desires on board action. . . .
>
> . . . One final incident occurred between Capt. MOODY and Maj. R.M. PATTEN [one of Col. COOPER's immediate subordinates]. Following Capt. MOODY's board's decision in a court-martial of an OCS Marine, Maj. PATTEN lengthily questioned the captain on the case and why it went differently than desired/anticipated. Following their conversation, Capt. MOODY came to my office and expressed concern over the constant command attention to board actions and the continual need to justify/explain actions and results. . . . [There was an] unrelenting focus on punitive and administrative actions against OCS personnel *by the command's senior officers and the [Fitness Report] reporting and reviewing [officers] of board members, the latter called upon to justify or explain not only their own, but their board's actions, never knowing if those deciding their careers would be*

inquiring or accusatory, that placed (what I consider) pressure on board members to either conform to the 'discharge dictum' or be prepared to do some lengthy explication (which could prove unacceptable and potentially shorten or terminate their careers).

Article 138 Package, p. 186. (emphasis added).

Captain Becker's statement then went on to describe a number of instances of discrimination against women Marines that were in violation of Marine Corps, Department of the Navy and Department of Defense equal employment regulations and directives. In particular, she stated that:

> . . . Women Marines were not permitted to instruct Marine or candidate classes at NCOLS or OCS after August 1982. This policy appears sexist, illegal, and was highly demoralizing to those of us who had been OCS instructors previously. . . .
>
> . . . No pregnant women Marines were permitted to attend NCOLS after May 1982. . . . Again, this apparently is illegal and directly affects women's retention or promotion in the Corps . . . *(i.e.,* NCOLS counts 20 points toward promotion . . .).
>
> . . . [W]e discovered that Lt. FISHER's platoon . . . had won the battalion drill competition, but was to be denied the recognition. Maj. WADDELL . . . personally confirmed to Lt. FISHER and me that the women would not receive the honor due to their sex. Neither can a woman candidate hold the battalion or company honor graduate positions, nor can one hold any high level graduation parade positions other than the [personnel officer] or platoon level slots . . . during training, women candidates were not allowed to act as the Candidate Company Commander, the most senior company billet. . . .
>
> . . . [A]fter the graduation of the 120th [Officers Candidate Class], Maj. LABAR spoke with 1st Lt. FISHER and me regarding general officers' and Col. COOPER's concerns that 'too many incoming women Marines are "jocks," further asking what "recruitment policies" we "could or should" institute to enlist/commission "more feminine women."'

Id. at p. 187.

Finally, Capt. Becker told Col Lawson that:

> . . . It was discussed [between myself and Col. Lawson] that direct, linear communications might have led to the misconstruction of information allegedly passed by Col. COOPER *(i.e.,* during the transfer of information from one person to the next, it was altered accidentally, thereby creating misrepresentations). This decidely, I do not believe to be the case. Information at OCS was passed . . . in a pyramidal structure *(i.e.,* Col. COOPER to his branch heads, they to their junior/subordinate officers and enlisted).[18] When the latter groups compared information received, marked similarities were noted, indicating the information had not been altered from that allegedly originated by Col. COOPER.
>
> . . . It was discussed [between myself and Col. Lawson] that perhaps the field grade officers had gone a bit 'overboard' inadvertently in expressing the colonel's advice/guidance/directives. This I do not know; however, *a consistent point within the Marine Corps leadership doctrine is that the commander has ultimate responsibility for all his subordinates do or fail to do. See footnote 18, below.*[19]

Article 138 Package, p. 188. (emphasis added).

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[18] In fact, as the Respondents and any military person knows, this is the classic definition of how the military "chain of command" is *required* to function. This concept of how information and orders flow from top to bottom is a classic example of military custom.

[19] This Court, in *In re Yamashita*, 327 U.S. 1 (1946), denied habeas corpus relief to General Yamashita who had been some 10,000 miles away from his troops when they committed atrocities. In upholding a death sentence, the Court held that a commander has "an affirmative duty to take such measures as were within his power and appropriate in the circumstances [to control the actions of his subordinates]. . . . This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals." *Id.* at 16 (footnote omitted).

Captain Becker's statement mentions the problems encountered by Lt. C. G. Wright for not following Col. Cooper's "guidance" regarding "correct" testimony and voting. In his statement to Col. Lawson during the Article 138 investigation, Lt. Wright stated that:

> . . . After testifying at a Court Martial on Sergeant DANIEL SOWMAN sometime in early 1982 . . . I was told that Colonel M. T. COOPER desired to see me. The Colonel wanted to know why I testified on Sergeant Sowman's behalf. . . . The Colonel thought that I didn't need to volunteer information and said he was rather disappointed in me. . . . Shortly after our talk the word was passed via [the Executive Officer, Maj. RIGOULOT] and principal staff officers . . . that Officers/SNCOs should consider carefully their testimony on behalf of drug abusers. One should tell the truth but subordinate/reconcile personal beliefs with the Commandant's desire to purge drug abusers from our ranks. It was inconceivable to [Col. COOPER] . . . that a[n NCO] or Officer could state that an individual with a documented history of drug abuse was worthy of retention and should not be discharged. It seemed some Officers/SNCOs were all too eager to testify on behalf of any drug abusers in direct defiance of [the Commandant of the Marine Corps'] policy. . . . As for [the Petitioner's] transfer [from Col. COOPER's command] . . . it was widely perceived that it was a direct result of his voting for retention of Staff Sergeant FREDERICK. . . .

Article 138 Package, p. 192.

Major R. M. Patten, one of Cooper's immediate subordinates, told Col. Lawson in a sworn statement that:

> Throughout 1982, I attended several weekly staff meetings, an Officer and SNCO class, and a field grade officers meeting in which Colonel COOPER . . . addressed the subject of testimony/ conduct at courts-martial or admin discharge boards. . . . On several occasions Colonel COOPER clearly stated that

> if we testified that 'excepting his misconduct, he was a good Marine,' or 'before this incident I held this Marine in high regard,' then that was okay. . . .

Article 138 Package, p. 195. This is a clear statement that Colonel Cooper was actually telling his subordinates what was permissible testimony, and what was not permissible testimony. Colonel Lawson, and the Respondents, could not have discovered more straightforward evidence of command influence than this. Captain Maxie W. Phillips told Colonel Lawson that his "Company Commander, Major G. A. Houle,[20] returned from a field grade officers' meeting and assembled Company C's staff to pass the word. During the course of the meeting Major Houle stated that *we should* avoid backing up Marines that are being tried by Court Martial for drug related offenses, or words to that effect. . . . *Article 138 Package*, p. 204. (emphasis added).

Without going into further detail, the preceding statements of Cooper's subordinates adequately supported Petitioner's 138 Complaints regarding command influence and the improper treatment of women Marines under Cooper's command at OCS. Many of the other sworn statements gathered by Col. Lawson during the investigation further backed up Petitioner's complaints against Cooper.

Petitioner was passed over for promotion in March, 1983, subjecting him to mandatory discharge on November 1, 1983, or as soon thereafter as he finished his physical disability processing. Petitioner filed an application for correction of his records, including the Article 138 Complaint Investigation, on June 23, 1983 (JA 83) with the Board for Correction of Naval Records ("BCNR").

Petitioner instituted this action on June 17, 1983. On June 27, 1983, the parties filed a joint stipulation agreeing to stay the district court action pending pursuit of administrative remedies before the BCNR. After a personal hearing before the BCNR, during which the Petitioner, and Captains Saul and Becker

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[20] Major Houle was one of the officers whom Colonel Lawson found had, in fact, passed on improper information regarding testimony at ADBs and courts-martial. (JA 71-72, paras. 1-4.)

testified under oath, the BCNR denied relief and, among other rulings, stated that they had no jurisdiction to correct an Article 138 Complaint investigation because it was not a "military record" within the meaning of 10 U.S.C. Section 1552(a) (1982). No witnesses were presented by the Respondents at the BCNR hearing. The district court case was reinstated on October 31, 1983, when the BCNR denied relief to the Petitioner, determining, *inter alia*, that it did not have jurisdiction (JA 1), except to direct that steps be taken to locate a missing fitness report (which was missing, with another report, from the materials considered by both promotion selection boards). The BCNR's reasoning for refusing to review and correct the Article 138 Investigation conducted by the Respondents, even for constitutional and regulatory violations, was that the final investigation did not appear in the Petitioner's military personnel records. *Cert. Pet. App. at A-4.*[21] These conclusions were reached by the BCNR despite its finding that the Petitioner's transfer from Cooper's command may well have resulted from his displeasure at the Petitioner's voting on ADBs. The BCNR did, in fact, question Cooper's judgment and fairness in its decision. (JA 23). Yet, the BCNR determined that although the Petitioner's transfer from Cooper's command may have been retaliatory, no such motives were found in regard to the contested Fitness Reports that Cooper helped write and which led directly to Petitioner's passover for Major and subsequent involuntary separation from the Marine Corps after 16 years of valiant and impeccable service. (JA 23).

On December 6, 1983, the district court dismissed the Petitioner's Article 138 claims for lack of subject matter jurisdiction, and affirmed the judgment of the Respondent Secretary of the Navy, who acted through the BCNR. *Cert. Pet. App. at A-2.* Petitioner filed his appeal with the United States Court of Appeals for the District of Columbia on December 22, 1983. (JA 3).

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[21] The Federal statute governing the duties of the BCNR states that they "may correct *any* military record of [the Navy or Marine Corps] . . . *when . . . necessary to correct an error or remove an injustice.*" 10 U.S.C. Section 1552(a) (1982). (emphasis added).

On May 31, 1985, the United States Court of Appeals for the District of Columbia transferred this action pursuant to 28 U.S.C. Section 1631 (1982) to the United States Court of Appeals for the Federal Circuit under the authority of the Federal Courts Improvement Act, 28 U.S.C. Section 1295(a)(2) (1982). *Van Drasek v. Lehman, et al.*, 762 F.2d 1065, 1067, 1072 (D.C.Cir. 1985). On January 23, 1986, the Federal Circuit Court of Appeals affirmed the district court in an unpublished *per curiam* decision adopting the trial court opinion of Judge Richey. Rehearing before the Federal Circuit was denied on April 1, 1986.

In August, 1986, a Petition for a Writ of Certiorari was filed in this Court, and Certiorari was granted on December 1, 1986.

SUMMARY OF ARGUMENT

The decisions of this Court establish time-honored history supporting the right of military personnel to seek protection of the Federal courts when appropriate to protect Constitutional rights. *See, e.g., Chappell v. Wallace,* 462 U.S. 296 (1983); *Secretary of the Navy v. Huff,* 444 U.S. 453 (1980); *Harmon v. Brucker,* 355 U.S. 579 (1958); *Burns v. Wilson,* 346 U.S. 137 (1953); *Wilkes v. Dinsman,* 48 U.S. (7 How.) 89 (1849), *after remand, Dinsman v. Wilkes,* 53 U.S. (12 How.) 390 (1851). Moreover, this Court has held on numerous occasions that judicial review should be restricted only when the Congress has legislated such restrictions. *Lindahl v. Office of Personnel Management,* ___ U.S. ___, 105 S.Ct. 1620, 1627 (1985); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967) (citation omitted). No such Congressional legislation exists to restrict non-damage Constitutional claims, and this Court has found such a claim to be nonjusticiable in only one case. In *Gilligan v. Morgan,* 413 U.S. 1 (1973), the district court was asked to exercise continuing regulatory jurisdiction over enlistment, training, discipline, equipping and purely discretionary activities of the National Guard. The Court concluded that "no justiciable controversy [was] presented," 413 U.S. at 11, because it was "difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.* at 10. Even in this type of case, however, the Court stated that "it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be

accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel whether by way of damages or injunctive relief." *Id.* at 11-12. This rule has been clearly restated in two recent decisions of this Court. *Chappel v. Wallace*, 462 U.S. 296, 304 (1983); *Secretary of the Navy v. Huff*, 444 U.S. 453, 458 n. 5 (1980) *(per curiam)*. In the present case, the Court is asked only for non-damages relief in reviewing allegations of violations of Petitioner's Constitutional rights under the First and Fifth Amendments because he complained that his superiors had violated Federal law and their own regulations when they committed specific unlawful acts against the Petitioner and other members of his command.

The Petitioner filed a formal Complaint against his superiors pursuant to Article 138, U.C.M.J., 10 U.S.C. Section 938 (1982), and then attempted to have the Complaint reviewed by the Board for Correction of Naval Records, pursuant to 10 U.S.C. Section 1552(a) (1982). These particular administrative remedies have been found to be required by this Court, *Chappell v. Wallace*, 462 U.S. 296, 302-303 (1983), and they were the only administrative remedies available. Once a service-person has exhausted his or her available administrative remedies, Article 138 Complaints are directly reviewable in Federal Courts on either Federal question jurisdiction, or the Administrative Procedures Act. *See* [*Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971); *Cortwright v. Resor*, 477 F.2d 245 (2d Cir. 1971); *United States ex rel. Berry v. Commanding General*, 411 F.2d 822 (5th Cir. 1969); *Allen v. Monger*, 404 F. Supp. 1081 (N.C. Cal. 1975); *Turner v. Calloway*, 371 F.Supp. 188 (D.D.C. 1974).] This is particularly true where the Article 138 Complaint has first been presented to the Board for Correction of Naval Records, whose proceedings have a settled case history of reviewability in the Federal courts under the APA. *See Heisig v. United States*, 719 F.2d 1153 (Fed. Cir. 1983); *Greig v. United States*, 640 F.2d 1261 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 907 (1982); *Powell v. Marsh*, 560 F.Supp. 636 (D.D.C. 1983); *Lord v. Lehman*, 540 F.Supp. 125 (E.D. Pa. 1982).

The Courts of Appeals have adopted several balancing tests applicable to constitutional challenges to military administrative decisions. A number of the Courts of Appeals and District Courts have adopted the test enunciated in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). *Williams v. Wilson*, 762 F.2d 357, 359 (4th Cir. 1985); *Pengaricano v. Llenza*, 747 F.2d 55, 60-61 (1st Cir. 1984); *Gonzalez v. Secretary of the Army*, 718 F.2d 926, 929-930 (9th Cir. 1983); *Rucker v. Secretary of the Army*, 702 F.2d 966, 969-970 (11th Cir. 1983); *Niezner v. Mark*, 684 F.2d 562, 563-564 (8th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *Lindenau v. Alexander*, 663 F.2d 68, 71 (10th Cir. 1981); *Williams v. United States*, 541 F.Supp. 1187 (E.D.N.C. 1982); *benShalom v. Secretary of the Army*, 489 F.Supp. 964 (E.D. Wis. 1980); *Cushing v. Tetter*, 478 F.Supp. 960 (D.R.I. 1979). The Federal Circuit has favorably cited the *Mindes* test without specifically adopting it, *Williams v. Secretary of the Navy*, 787 F.2d 552, 558-559 n. 8 (Fed. Cir. 1986), and the Sixth Circuit has apparently not decided one way or the other. In *Mindes, supra*, the court said that the soldier must first allege a deprivation of a constitutional right or violation of a Federal statute or military regulation, and that exhaustion of military remedies is necessary. 453 F.2d at 201. Once these thresholds have been met, the reviewing court must then weigh four factors in determining whether to review the military decision being challenged: (1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with military functions; and (4) the extent to which the exercise of military expertise or discretion is involved. *Mindes, supra*, 453 F.2d at 201-202. Assuming that the *Mindes* test is adopted by this Court, the Petitioner more than met all requirements for judicial review. However, given this Court's holdings favoring judicial review of governmental action absent Congressional intent to specifically deny review, the *Mindes* test is too restrictive and should not be adopted as the balancing test to apply when soldiers allege deprivations of Constitutional rights, or violations of Federal law or military regulations.

This Court should adopt a test similar to that fashioned in *Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981), and by the Court of Appeals and the District Court for the District of Columbia in cases such as *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979), *clarified*, 627 F.2d 407 (D.C. Cir. 1980), and *Owens v. Brown*, 455 F.Supp. 291 (D.D.C. 1978).

The lack of meaningful review of Petitioner's Article 138 Complaint outside his chain-of-command and the uniformed military is underscored by the BCNR's abdication of its statutorily mandated responsibility under Federal law: "The Secretary of a military department . . . acting through boards of civilians . . . , may correct *any* military record of that department when he considers it necessary to correct an error or remove an injustice." *10 U.S.C. Section 1552(a)(1982)*(emphasis added). In the instant case, the BCNR refused to review Petitioner's Article 138 Complaint either procedurally or substantively. *Joint Appendix, Van Drasek v. Lehman, et al.*, No. 86-319 (U.S.Sup.Ct.) at pp. 18-20.[22] The BCNR ruled that the "record of proceedings under Article 138, UCMJ is not a matter properly before the Board. In that regard, the Board particularly notes that this record of proceedings does not appear in Petitioner's military personnel record. . . . The Board adopts the position stated by the attorney-advisor assigned to this case (see transcript of oral hearing, enclosure 3, pp. 6 and 7)." *SCJA at p. 18.* The BCNR took the position, noted above, that because the Article 138 proceedings weren't in Petitioner's official military personnel record, they were not "any military record" within the meaning of 10 U.S.C. Section 1552(a) (1982). This position flies in the face of both logic and the plain meaning of the language in the statute. The word "any" has one simple meaning that any rational person should have no problem understanding. No recitation to caselaw is necessary to support the well-known rule of statutory construction that words in statutes, like constitutional provisions, must be given their plain meaning. Moreover, in cases of constitutional interpretation, the customary deference granted to an agency's interpretation, of its own regulations is inappropriate. *Salvail v. Nashua Board of Education*, 469

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[22] Hereinafter referred to as "SCJA at p. ____."

F.Supp. 1269 (D.N.H. 1979). At a minimum, this Court should remand this case to the District Court with an order that the BCNR review the Article 138 Complaint for procedural and substantive correctness.

The courts below were also in error when they found that the Petitioner did not have standing to raise complaints of wrongs done to other members of his command by their mutual commanding officer. These claims dealt with sex discrimination against women Marines that were raised by the Petitioner, and by persons interviewed by the Article 138 Complaint investigator. Both Article 138, UCMJ, and 10 U.S.C. Section 5947 (1982), gave Petitioner standing to have these other issues considered during the course of his Article 138 Complaint investigation. Not only do the plain meaning of the words contained in 10 U.S.C. Section 5947 (1982) make this patently clear, but this law has been implemented by the Respondents in one of their own regulations. *See NAVREGS 1105.1* (the appropriate language of both the Federal statute and the Respondent's regulation is produced at footnote 15, *ante).*

Finally, the courts below were in error when they ruled that the APA, specifically 5 U.S.C. Section 701(b)(1)(F) (1982), precluded judicial review of the Article 138 Complaint. That section applies only to "courts martial and military commissions," and is, thus, totally inapplicable to the instant case. An Article 138 Complaint investigation, and decisions of the BCNR, are not covered by the quoted language. This Court has squarely held that a "military commission" is actually "the . . . war court," used to try civilians during time of war. *Madsen v. Kinsella*, 343 U.S. 341, 345-347, n.9 (1952). Thus, the Courts below were clearly in error when they refused to review the Article 138 Complaint on its merits, or to tell the BCNR that they acted improperly when they ruled that an Article 138 Complaint investigation was not a military record within the meaning of 10 U.S.C. Section 1552(a) (1982). *See Cert. Pet. App. at A-5, A-7.*

ARGUMENT

I

MILITARY PERSONNEL SHOULD NOT BE DENIED JUDICIAL REVIEW WHEN SEEKING ONLY EQUITABLE RELIEF FOR CONSTITUTIONAL, STATUTORY, OR REGULATORY VIOLATIONS COMMITTED BY THEIR SUPERIOR OFFICERS.

This Court has never held that military personnel have no access to the Federal courts when seeking review of military determinations that impinge on Constitutional rights. To the contrary, this Court has a history of reviewing such claims that dates back almost to the Nation's beginning. *See, e.g., Wilkes v. Dinsman,* 48 U.S. (7 How.) 89 (1849), *after remand Dinsman v. Wilkes,* 53 U.S. (12 How.) 390 (1851);[23] *Burns v. Wilson,* 346 U.S. 137 (1953); *Harmon v. Brucker,* 355 U.S. 579 (1958); *Secretary of the Navy v. Huff,* 444 U.S. 453 (1980) *(per curiam); Chappell v. Wallace,* 462 U.S. 296 (1983); *Goldman v. Weinberger,* ___ U.S. ___, 89 L.Ed.2d 478 (1986). Moreover, without ever questioning the Federal judiciary's power to review Constitutional, statutory and regulatory violations of the military departments, this Court has ruled on the merits in many such cases. *Goldman v. Weinberger, supra* (First Amendment freedom of religion attack on military regulation); *Chappell v. Wallace, supra* (First and Fifth Amendment Bivens-type claims for race discrimination); *Secretary of the Navy v. Huff, supra* (First Amendment challenge to Navy and Marine Corps regulations concerning circulation of petitions to members of Congress); *Brown v. Glines,* 444 U.S. 348 (1980) (First

[23] *Wilkes v. Dinsman,* concerned an enlisted Navy man's claim for damages against his commanding officer for having him illegally flogged and imprisoned. The officer was sued for damages under a common law theory and the Court held that the officer could be found liable under such a theory. Despite this Court's later rulings that the military could not be held liable for damages that occurred while a person was on active duty because of immunity granted under the Federal Tort Claims Act, *see Feres v. United States,* 340 U.S. 135 (1950); *Chappel v. Wallace,* 462 U.S. 296 (1983), the *Wilkes* decision has been distinguished on the grounds that the case "involved a well-recognized common law cause of action . . . and did not ask the Court to imply a new kind of cause of action." *Chappell v. Wallace, supra,* 462 U.S. at 305 n. 2.

Amendment challenge to Army regulations requiring commander's approval prior to circulating petitions); *Schlesinger v. Ballard,* 419 U.S. 498 (1975) (Fifth Amendment equal protection claim for gender Amendment equal protection claim for gender discrimination caused by Federal statute); *Middendorf v. Henry,* 425 U.s. 25 (1976) (Fifth and Sixth Amendment attacks on military's failure to provide counsel for summary courts-martial); *Parker v. Levy,* 417 U.S. 733 (1974) (vagueness and overbreadth challenge to Federal statute); *Frontiero v. Richardson,* 411 U.S. 677 (1973) (Fifth Amendment equal protection challenge to Federal law resulting in gender discrimination); *Harmon v. Brucker, supra* (due process challenge to Army discharge regulation); *Orloff v. Willoughby,* 345 U.s. 83 (1953) (due process and Fifth Amendment self-incrimination challenge to Federal statute and military personnel decisions); *Burns v. Wilson,* 346 U.S. 137 (1953) (habeas corpus attack on court-martial conviction under Fifth Amendment due process analysis); *Ex parte Reed,* 100 U.S. 13 (1979) (habeas corpus relief available to review courts-martial convictions).

In three recent decisions of this Court, it has been made clear that, under appropriate circumstances, members of the armed forces may seek Federal course review for constitutional wrongs suffered in the course of military service. In *Gilligan v. Morgan,* 413 U.S. 1 (1973), the Petitioners had sought expansive court monitoring of the activities of the Ohio National Guard in the aftermath of the Kent State student killings by Guard members. *Id.* at 5. Although the Court ultimately held the matter to be non-justiciable because it would require a court to assume continuing regulatory jurisdiction over Guard activities, *id.* at 5-12, the Court forcefully stated that:

> In concluding that no justiciable controversy is presented, it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, . . . by way of injunctive relief.

Id. at 11-12. In *Secretary of the Navy v. Huff, supra,* the servicemen sought declaratory and injunctive relief, on First Amendment grounds, against future enforcement of four Navy and

Marine Corps regulations requiring military personnel at overseas bases to obtain command approval before circulating petitions addressed to members of Congress. 444 U.S. at 454-457. Although upholding the military's actions, the Court noted that:

> A member of the service who thinks that his commander has misapplied . . . regulations can seek remedies within the service. *See, e.g.*, Uniform Code of Military Justice, Art. 138, 10 U.S.C. Section 938. Furthermore, the federal courts are open to assure that, in applying the regulations, commanders do not abuse the discretion necessarily vested in them.

Secretary of the Navy v. Huff, supra, 444 U.S. at 457-458 n. 5.

Most recently, in *Chappell v. Wallace, supra,* this Court again confirmed access to the Federal courts by military personnel, particularly where non-damages relief is sought for alleged violations of Constitutional, statutory, or regulatory rights. The Petitioners in *Chappell* had filed suit against their superior officers in a *Bivens*-type action for monetary damages, alleging that they had been discriminated against because of their race. The Court held that such actions could not lie for damages for the same reasons as those enunciated in *Feres v. United States,* 340 U.S. 135 (1950): the Government was immune under the Federal Tort Claims Act, in combination with "the unique relationship between the Government and military personnel . . . , 'the peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline . . .'" *Chappell, supra,* 462 U.S. at 299, *quoting United States v. Muniz,* 374 U.S. 150, 162 (1963) and *United States v. Brown,* 348 U.S. 110, 112 (1954). However, the Court in *Chappell* noted that the Petitioners had failed to avail themselves of intra-service administrative remedies—Article 138 Complaints and military records corrections pursuant to 10 U.S.C. Section 1552(a) (1982). 462 U.S. at 302-303. The Court then went on to state that:

> Chief Justice Warren had occasion to note that 'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.' Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L.Rev. 181, 188 (1962). This Court has never held, nor do we now hold, that military personnel are barred form all redress in civilian courts for constitutional wrongs suf-fered in the court of military service. . . .]

Chappell, supra, 462 U.S. at 304-305. (citations omitted)

The best analysis of the relationship between this Court's decision in *Chappell* and judicial review of military decisions where the soldier seeks injunctive relief and not damages, was recently accomplished in *Jorden v. National Guard Bureau,* 799 F.2d 99 (3d Cir. 1986). The *Jorden* court correctly observed that although "damage claims" by soldiers against their superiors would not be heard by Federal courts, "[t]he clear implication of *Chappell* is that ... some non-damage constitutiona. claims involving the military remain viable. . . ." 799 F.2d at 107. The *Jorden* court then went on to state that:

> *Chappell* made no direct reference to claims for injunctive relief against the military, but it did cite *Brown* [*v. Glines, supra*], Parker [*v. Levy, supra*], and *Frontiero* [*v. Richardson, supra*], as examples of suits against the military that remain viable. 462 U.S. at 304-05. . . . Three years after *Chappell,* the Court heard another case involving a claim for injunctive relief in the military context, and made no mention of a reviewability problem. *Goldman v. Weinberger,* ___ U.S. ___, 89 L.Ed.2d 478 (1986). . . .
>
> This court, too, has entertained suits for injunctive relief against the military. . . .
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> • • • • •
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> [T]he Court in *Brown [v. Glines, supra],* expressly stated that judicial scrutiny was not limited to facial constitutional challenges; rather, legitimate constitutional claims could arise from the application of the . . . statutes and regulations [governing the military]. 444 U.S. at 357 n. 15. ... The recent *Goldman* case involved such a challenge.
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> All of the courts to consider the question have held that *Chappell* leaves open claims by discharged military personnel for injunctive relief. *Ogden v. United States,* 758 F.2d 1168 (7th Cir. 1985);

Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984); *Gant v. Binder*, 596 F.Supp. 757 (D.Neb. 1984), *aff'd.*, 766 F.2d 358 (8th Cir. 1986) .

Jorden, supra, 799 F.2d at 109. (citations and footnote omitted) Finally, although the *Jorden* court affirmed the district court's dismissal of the damage claims under *Chappell*, it reversed and remanded on the constitutional challenge seeking only injunctive relief in the form of reinstatement in the National Guard. *Id.* at 111. The *Jorden* court reasoned that:

> . . . Jorden alleges that he was discharged in violation of his constitutional rights. . . . [I]f Jorden establishes a constitutional violation, the remedy will be a court-ordered reinstatement, rather than the kind of ongoing judicial oversight held inappropriate in *Gilligan [v. Morgan*, 413 U.S. 1 (1973)]. . . . Jorden's claims for reinstatement are reviewable.
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> . . . [O]n remand, if Jorden can demonstrate that the discharge violated his constitutional rights, he is entitled to reinstatement.

Jorden, supra, 799 F.2d at 111. (citations omitted)

This Court's own decisions, as well as cases such as *Jorden, Ogden, Penagaricano* and *Gant*, stand for the clear proposition that claims such as those raised in the instant case may be reviewed by Federal courts.

II

THE COURTS BELOW ERRED AS A MATTER OF LAW IN RULING THAT THEY LACKED SUBJECT MATTER JURISDICTION TO REVIEW PETITIONER'S COMPLAINT, FILED PURSUANT TO ARTICLE 138, UNFORM CODE OF MILITARY JUSTICE, 10 U.S.C. SECTION 938 (1982), WHICH ALLEGED THAT HIS SUPERIOR COMMANDING OFFICERS VIOLATED HIS RIGHTS UNDER THE FIRST AND FIFTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

A. Only Upon A Showing Of Clear And Convincing Evidence Of A Contrary Legislative Intent Should The Courts Restrict Judicial Review

This Court has "often noted that 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.' *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141... (1967) (citation omitted)." *Lindahl v. Office of Personnel Management*, ___ U.S. ___, 105 S.Ct. 1620, 1627 (1985). In the military context, Congress has not restricted judicial review of non-damage Constitutional claims by military personnel. Moreover, Congress' intent to restrict such review would be clearly legislated. For instance, 38 U.S.C. Section 211(a) (1982) forbids any review, by any court, on any ground, "on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents and survivors. . . ." As to the type of "case and controversy," *see Flast v. Cohen*, 392 U.S. 83, 94-95 (1968), raised by the Petitioner in the instant case, no such statutory restriction exists now, or has ever existed. The fact that non-damage Constitutional questions are reviewable is clearly exemplified by Congress' grant of sovereign immunity as to damage claims against the military that is found in the Federal Tort Claims Act. *See Chappell v. Wallace, supra*, 462 U.S. at 298-300. Clearly, if congress had intended at any time to bar judicial access in non-damage claims, they would have so stated. As this Court recently noted, "[a]bsent more compelling indicia of congressional intent—whether from [some] overall statutory structure or . . . legislative history—we thus believe . . . that '"[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others."'"

Lindahl, supra, 105 S.Ct. at 1628-1629. Thus, great weight must be afforded Congress' inaction over the past 40 years as to the numerous Federal court decisions that have found non-damage Constitutional claims by military personnel to be justiciable.

This Court has found review of non-damage claims to be nonjusticiable in only one case. In *Gilligan v. Morgan,* 413 U.S. 1 (1973), the district court was asked to exercise continuing regulatory jurisdiction over enlistment, training, discipline, equipping and purely discretionary activities of the Ohio National Guard. This Court concluded that "no justiciable controversy [was] presented," 413 U.S. at 11, because it was "difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.* at 10. In fact, *Gilligan* is the only case since *Baker v. Carr,* 369 U.S. 186 (1962), in which this Court has invoked the political question doctrine to hold an issue nonjusticiable. Tribe, *American Constitutional Law 78 (1978).* As Professor Tribe correctly noted:

> Plaintiffs [in *Gilligan]* had asked the federal courts to evaluate under the fourteenth amendment due process clause the training of the Ohio National Guard; if that training was found constitutionally deficient, they sought appropriate injunctive relief. The Supreme Court's decision that the issue was nonjusticiable turned on a number of factors; chief among them, however, were the facts that article 1, Section 8, authorized Congress to engage in just such supervision, and that judicial review in this area would be essentially standardless: '[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* [Court's emphasis] to civilian control of the Legislative and Executive Branches.'

Tribe, *supra,* at 78-79, *quoting Gilligan, supra,* 413 U.S. at 10. However, the Court made it plain in *Gilligan* that even the National Guard was not beyond the reach of the Federal courts under appropriate facts:

> [I]t should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review of that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel whether by way of damages or injunctive relief.

Id. at 11-12. As noted in Argument I, *ante,* this forceful admonition has recently been twice repeated by this Court in *Chappell* and *Secretary of the Navy v. Huff.* Finally, the justiciability/political question ruling in *Gilligan* is best understood as correct because of the extreme and unmangeable remedy sought by the plaintiffs: "a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard." 413 U.S. at 5. The Petitioner here seeks no such remedy. Vindication of violations of his and others' Constitutional rights by equitable remedies would require no such "continuing regulatory jurisdiction" over the Respondents in this case. Petitioner seeks no extreme or unmanageable remedy. To the contrary, the remedy sought here would enhance the military and have the effect of restoring correct discipline, as well as simply forcing the Respondents to obey the mandates of the Constitution, Federal law and their own regulations. The courts here were asked only for non-damages injunctive relief in reviewing allegations of violations of Petitioner's Constitutional rights under the First and Fifth Amendments because he complained that his superiors had violated Federal law and their own regulations when they committed specific unlawful acts against the Petitioner and other members of his command. Under any measure of the law, these claims are justiciable in the Federal courts.

B. Article 138 Complaints Are Directly Reviewable In Federal Court Once A Serviceperson Has Exhausted All Intra-military Administrative Remedies

The Petitioner filed a formal Complaint against his superiors pursuant to Article 138, U.C.M.J., 10 U.S.C. Section 938 (1982), and then attempted to have the Complaint reviewed by the Board for Correction of Naval Records, pursuant to 10 U.S.C. Section 1552(a) (1982). These particular administrative remedies have been found to be required by this Court, as well as other Federal courts, prior to seeking judicial review. *Chappell v. Wallace, supra,* 462 U.S. at 302-303; *Muhammad v. Secretary of the Army,*

770 F.2d 1494, 1495-1496 (9th Cir. 1985); [*Ogden v. United States*, 758 F.2d 1168, 1177-1178 (7th Cir. 1985)] *Fairchild v. Lehman*, 609 F.Supp. 287 (E.D. Va. 1985). Both of these remedies were exhausted in the present case, and, thus, Petitioner's claims "are judicially reviewable." *Stanley v. United States*, 574 F.Supp. 474 (S.D. Fla., N.D. 1983), *affirmed* 786 F.2d 1490 (11th Cir. 1986), *cert. granted*, ___ U.S. ___, 55 U.S.L.W. 3405 (Dec. 9, 1986). As one court recently stated:

> Congress has enacted an intricate scheme of administrative remedies to handle the grievances of military personnel. . . . The Uniform Code of Military Justice, 10 U.S.C. 938 [is one such remedy]. . . . This statute has been held applicable to the grievances of the Marine Corps. . . . *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969). While a discretionary denial of relief under 10 U.S.C. Section 938 is not reviewable in district court, failure to respond to a serviceman's invocation of these procedures *or failure to properly follow the procedures set forth in the statute is reviewable. Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969). (emphasis added).

Ayala v. United States, 624 F.Supp. 259, 262-263 S.D.N.Y. (1985). The *Ayala* court then went on to say that there could be further review by "a civilian review board [BCNR], which operates pursuant to 10 U.S.C. Section 1552, whose function is to review applications for the presence of an error or injustice and make recommendations for corrective action. . . . Unlike the remedy afforded under 10 U.S.C. Section 938, the proceedings of the BCNR are subject to judicial review and can be overturned. . . . *Chappell v. Wallace, supra*, 462 U.S. at 303. . . ." *Ayala, supra*, 524 F.Supp. at 263. Clearly then, if servicemen seek Article 138 relief, and then proceed to the BCNR and are still dissatisfied, they may seek judicial review. BCNR proceedings—the responsibility of the Respondents Lehman and Cox—have a settled case history of reviewability in the Federal courts under the Administrative procedures Act. *See Heisig v. United States*, 719 F.2d 1153 (Fed. Cir. 1983); *Grieg v. United States*, 640 F.2d 1261 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 907 (1982); *Powell v. Marsh*, 560 F.Supp. 636 (D.D.C. 1983); *Lord v. Lehman*, 540 F.Supp. 125 (E.D. Pa. 1982).

Numerous courts have reviewed Article 138 Complaints, with and without further proceedings by a corrections board. *See Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971); *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969); [*United States ex rel. Barry v. Commanding General*, 411 F.2d 822 (5th Cir. 1969);] *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969); *Cushing v. Tetter*, 478 F.Supp. 960 (D.R.I. 1979); *Hickey v. Commandant of Fourth Naval Dist.*, 461 F.Supp. 1085 (E.D. Pa. 1978); *Allen v. Monger*, 404 F.Supp. 1081 (N.D. Cal. 1975); *MacKay v. Hoffman*, 403 F.Supp. 467 (D.D.C. 1975); *Turner v. Calloway*, 371 F.Supp. 188 (D.D.C. 1974). Without question, then, the courts below erred when concluding they lacked subject matter jurisdiction over Petitioner's Article 138 Complaint after he had also pursued relief before the BCNR.

C. Assuming The Test Enunciated In *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), Is The Proper Balancing Test Applicable To Constitutional Challenges To Military Administrative Decisions, The Instant Case Meets The Test.

The Courts of Appeals have adopted several balancing tests applicable to Constitutional challenges to military administrative decisions. Many Courts of Appeals and District Courts have utilized the test enunciated in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). *Williams v. Wilson*, 762 F.2d 357, 359 (4th Cir. 1985); *Penagaricano v. Llenza*, 747 F.2d 55, 60-61 (1st Cir. 1984); *Gonzalez v. Secretary of the Army*, 718 F.2d 926, 929-930 (9th Cir. 1983); *Rucker v. Secretary of the Army*, 702 F.2d 966, 969-970 (11th Cir. 1983); *Niezner v. Mark*, 684 F.2d 562, 563-564 (8th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *Lindenau v. Alexander*, 663 F.2d 68, 71 (10th Cir. 1981); *Williams v. United States*, 541 F.Supp. 1187 (E.D.N.C. 1982); *benShalom v. Secretary of the Army*, 489 F.Supp. 964 (E.D. Wis. 1980); *Cushing v. Tetter*, 478 F.Supp. 960 (D.R.I. 1979). The Federal Circuit has favorably cited *Mindes* without specifically adopting it, *see Williams v. Secretary of the Navy*, 787 F.2d 552, 558-559 n.8 (Fed. Cir. 1986), and the Second and Sixth Circuits have apparently not decided one way or the other.

In *Mindes, supra*, the court said that the soldier must first allege a deprivation of a constitutional right or violation of a Federal statute or military regulation, and that exhaustion of

military remedies is necessary. 453 F.2d at 201. Once these thresholds have been met, the reviewing court must then consider four factors in deciding whether to review the military decision being challenged on the merits: (1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with military functions; and (4) the extent to which the exercise of military expertise or discretion is involved. *Mindes, supra,* at 201-202. Assuming that this Court adopts the *Mindes* test as the correct analysis to determine the justiciability of non-damage Constitutional claims of military personnel, the Petitioner more than meets the requirements for judicial review based on the facts of the instant case.

The *Mindes* test was used in *Chappell v. Wallace,* 661 F.2d 729 (9th Cir. 1981), *rev'd on other grounds,* 462 U.S. 296 (1983), with the recognition that the plaintiffs had not exhausted their intra-service remedies under Article 138, U.C.M.J., 10 U.S.C. Section 938 (1982), and 10 U.S.C. Section 1552(a) (1982). *See Chappell, supra,* 462 U.S. at 302-303. The *Mindes* test has not been adopted by the United States Court of Appeals for the District of Columbia, although in *VanderMolen v. Stetson,* 571 F.2d 617, 624 (D.C. Cir. 1977), the court cited *Mindes* for the principle that "actions by an agency of the executive branch in violation of its own regulations are illegal and void. . . ." *See Owens v. Brown,* 455 F.Supp. 291 (D.D.C. 1978). Despite the historical reluctance by the courts to intercede in military decision-making, and despite the stringency of the *Mindes* test, the strength of the Petitioner's claim for judicial review in this case is, indeed, compelling in its satisfaction of all elements of the test. *Cf. Van Drasek v. Lehman, et al.,* 762 F.2d 1065 (D.C.Cir. 1986, *cert. granted,* ___ U.S. ___, 107 S.Ct. 567 (1986) ("Van Drasek's claim for monetary relief is far from frivolous," *Id.* at 1071).

Captain Van Drasek has asserted that the Article 138 Complaint investigation violated the Due Process Clause of the Fifth Amendment; that his First Amendment right to free expression was chilled by Colonel Cooper's biased fitness reports, and by the command influence exerted by Colonel Cooper; that his removal from the ADB and his transfer violated 10 U.S.C. 837 and MCDEC Order 5210.1; and that his promotion passovers, being a result of biased fitness reports and an incomplete promotion

package, requiring his discharge constituted a deprivation of property rights in violation of the Due Process Clause of the Fifth Amendment. As these are all violations of some constitutional rights, some statute, or some regulations, they satisfy the first *Mindes* requirement. Since Captain Van Drasek has exhausted his administrative remedies, he has satisfied both initial *Mindes* requirements. *Navas, supra,* 752 F.2d at 769; *Mack v. Rumsfeld,* 609 F.Supp. 1561, 1563 (W.D.N.Y. 1985); *Wronke v. Marsh,* 603 F.Supp. 407, 410 (C.D.Ill. 1985), *rev'd and remanded,* 787 F.2d 1569 (Fed. Cir. 1986), *cert. denied,* 107 S.Ct. 188 (1986).

The basic nature of Captain Van Drasek's claims is that statutes and regulations promulgated for the protection of service-members were violated on numerous levels by Colonel Cooper and by the officers involved in processing Petitioner's Article 138 and BCNR requests. Violated were: Marine Corps Equal Opportunity guidelines; the statute prohibiting command influence, 10 U.S.C. 837; regulations providing for the orderly transfer of personnel, MCDEC Order 5210.13C, 5210.1; procedures for investigation and redress of wrongs done to service members, Article 138, 10 U.S.C. 938 *(see Amended Verified Complaint,* paragraphs 32-45, 52-57, 63, 66, 68-87); regulations for the determintion of promotion, SECNAVINST 1420.1, p. 4, paragraphs 5(g)(3) and 5(i)(2). The foregoing violated Captain Van Drasek's First Amendment right to free expression and his Due Process rights under the Fifth Amendment. These are important charges, and since they involve the Navy's own regulations and Congressional legislation protecting service members' rights, they are fully capable of supporting judicial review.

If judicial review is refused, the consequences to Captain Van Drasek and to the Navy and Marines are serious. Refusal to review would reinforce the following types of conduct which have occurred in this case: superior officers could continue to exercise pressure over military courts and boards; the chain-of-command could fail to conduct a proper and legal investigation of such acts; the Secretary of the Navy could approve improper and illegal investigations; retaliatory acts can be taken against those who make official complaints of such acts; none of these will be reviewable by either the BCNR or the federal courts. Refusal to review also would have a "chilling effect" on service members' freedom of expression, especially in light of the fact that the

suppressed speech here was made to bring the Corps into compliance with its own regulations. Personally, Captain Van Drasek, one of the few officers of his own rank to have combat experience in Viet Nam, has lost a career he valued highly, and he lost it because he was so honorable as to act against those things which diminished it. These are just the type of consequences the *Mindes* test is used to prevent. *Gonzales v. Department of the Army*, 718 F.2d 926, 930 (9th Cir. 1983); *Cortright v. Resor*, 447 F.2d 245, 251 (2d Cir. 1971). In discussing *Mindes*, the *Wronke* court stated that, "[r]eview is particularly appropriate where a challenged action is alleged to have violated a particular service's own regulations." 603 F.Supp. at 411.

The type and degree of interference with military functions in this case is an important factor. What a decision in Captain Van Drasek's favor would require is an order that the Navy and Marines comply with all applicable regulations and statutes in considering Captain Van Drasek's claims; in other words, that Respondents obey the law. Captain Van Drasek's claims are that numerous regulations and statutes promulgated specifically for the protection of service members' rights were violated in the process of a service member invoking their protection.

In particular the underlying allegation of command influence, is a long recognized problem that is especially unsuited to be left to military self-control.

> [The legislative history of the Uniform Code of Military Justice reveals that . . . Congress intended to reduce the level of command control over the military justice system. The Congress believed that public confidence in the fairness of military justice would be promoted by establish-ment as the highest tribunal in the military justice system a court composed of civilians who would not be controlled by the Secretary of Defense or by any of the branches of the military service. *Mundy v. Weinberger*, 544 F.Supp. 811, 820-21 (D.D.C. 1982).]

The district court recognized that military personnel may not be "'stripped of basic rights simply because they have doffed their civilian clothes.' E. Warren, *The Bill of Rights & the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962). *See also Chappell*, 103 S.Ct. at 2367-68; *Parker*, 417 U.S. at 758. Civilian courts have the power to oversee certain aspects of the military justice system . . ." (J.A. 10-11).

The last *Mindes* factor to be considered is the extent to which military expertise and discretion are involved. Captain Van Drasek has not requested the Court to substitute its expertise or discretion in peculiarly military matters. If the Court finds that Captain Van Drasek's claims of violations in the Article 138 investigation were correct, a task which the Court was created to perform and is well-qualified to do, then he is asking that the Court issue orders appropriate to those findings, and therefore the military's discretion would not be interfered with at all.

D. The *Mindes* Test Is Too Restrictive Where The Remedies Sought Against The Military Involve Injunctive Relief, Declaratory Judgment, Or Mandamus Relief, And The Court Is Not Required To Exercise Continuing Regulatory Jurisdiction Over Enlistment, Training, Discipline, Equipping And Purely Discretionary Activities Of The Military Such As That Requested In *Gilligan v. Morgan*, 413 U.S. 1 (1973).

Given this Court's holdings favoring judicial review of governmental action absent Congressional intent to specifically deny or restrict review, the *Mindes* test is too restrictive and should not be adopted as the balancing test to be applied when soldiers allege deprivations of Constitutional rights, or violations of Federal law or military regulation, by their superiors. This seems particularly logical where, as here, the Petitioner seeks only equitable types of relief. *Mindes* appears unduly restrictive because the Petitioner alleges violations of the Constitution as well as Federal statutes, and military regulations. Thus, facially, the requirements of 28 U.S.C. Section 1331 (1982), are satisfied. Various courts have held that jurisdiction over military decisions under such circumstances when a plaintiff contends that the military unlawfully failed to follow its own regulations, and such courts have not required the restrictive balancing required by *Mindes* prior to review. *See e.g., Woodard v. Marsh*, 658 F.2d 989 (5th Cir. 1981); *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981); *Dillard v. Brown*, 652 F.2d 316, 319 (3d Cir. 1981); *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979); *Crawford v. Cushman*, 531 F.2d 1114, 1120 (2d Cir. 1976); *Tufts v. Bishop*, 551 F.Supp. 1048, 1050 (D. Kan. 1982). The restrictive nature of *Mindes* is pointed out in *Tufts v. Bishop, supra*, which applied *Mindes* to grant review:

> Plaintiff's claim is obviously very serious, since she contends defendants knowingly denied her the protec-

tion of laws and regulations *designed to assist her in the administrative prosecution of her discrimination claim. The potential injury to plaintiff, if review is refused, is great, because plaintiff has no other forum in which to pursue a remedy for denial of her constitutional rights.* [emphasis added].

. . . [P]laintiff's case does not appear to present any serious impairment to the performance of vital military duties. Lastly, plaintiff's case does not appear to present a situation where a significant exercise of military expertise or discretion is involved, for the regulations [and Federal statute] allegedly violated by defendants are clear.

* * * * *

[Finally,] . . . plaintiff's complaint does not appear to be an attempt to disguise a common tort as a constitutional violation to skirt the *Feres* doctrine [and the recent decision in *Chappell v. Wallace, supra*].

Tufts v. Bishop, supra, at 1051. Clearly, where claims such as those made in *Tufts* and the instant case are alleged, an extremely restrictive balancing test can only serve to deny access to the Federal courts in cases that will result in "the fox guarding the henhouse."

E. The Appropriate Balancing Test To Cases Such As Petitioner's Is A Combination Of The Rules Devised In *Dillard v. Brown,* 652 F.2d 316 (3d Cir. 1981), *Dilley v. Alexander,* 603 F.2d 914 (D.C. Cir. 1979), and *Owens v. Brown,* 455 F.Supp. 291 (D.D.C. 1978)

(i) There Is Not Present In This Case Either The Level Of Intrusion Into The Responsibilities Of The Military, Nor The Lack Of Competence Of The Judiciary, That Was Found To Exist In *Gilligan v. Morgan, Supra*

(ii) The *Mindes* Test Improperly Intertwines The Concept Of Justiciability With The Standards To Be Applied To The Merits Of The Case

This Court should adopt a test similar to that fashioned in *Dillard v. Brown,* 652 F.2d 316 (3d Cir. 1981), and by the Court of Appeals, and the District Court for the District of Columbia, in cases such as *Dilley v. Alexander,* 603 F.2d 914 (D.C. Cir. 1979), *clarified,* 627 F.2d 407 (D.C. Cir. 1980), and *Owens v. Brown,* 455 F.Supp. 291 (D.D.C. 1978). In *Dillard, supra,* the Court properly rejected the *Mindes* test because "it intertwines the concept of justiciability with the standards to be applied to the merits of the case." 652 F.2d at 323. The *Dillard* court correctly noted that *Gilligan, supra,* and *Orloff v. Willoughby,* 345 U.S. 83 (1953)), "established the basic parameters for determining the justiciability of challenges brough against the military." *Dillard, supra,* at 323. The *Dillard* court then held that "[o]nce a claim falls within these parameters, a Court should review the claim on the merits." *Id.* at 323. Moreover, the *Dillard* court correctly analyzed *Gilligan* and *Orloff* as requiring no more than allowance of latitude to military discretion and, having done so, "a constitutional challenge brought against the military, which does not require a court to run the military, is justiciable." 652 F.2d at 320-322. A similar analysis was applied in *Owens v. Brown,* 455 F.Supp. 291, 299-303 (D.D.C. 1978). In that case, the court correctly stated that simply because they should "exercise a large measure of self restraint," *id.* at 300, prior to reviewing military decisions, this did not

> of necessity compel the courts to abdicate their responsibility to decide cases and controversies merely because they arise in the military context. Contrary to [the Government's] assertion, the deserved margin of latitutde afforded the political branches of government in rendering military judgments seems *as a general matter* [court's emphasis] to figure more prominently into whether particular decisions are lawful than into whether they are susceptible to review at all. Whether the deference due particular military determinations rises to the level of occasioning nonreviewability is a question that varies from case to case and turns on the degree to which the specific determinations are laden with discretion and the likelihood that judicial resolution will involve the courts in an inappropriate degree of supervision over primary military activities.

455 F.Supp. at 300. (citations omitted)

In the present case, considering the serious allegations of command influence and retaliation against the Petitioner for exercising his Constitutional rights, the military's discretion in reviewing his Article 138 Complaint was narrow and limited by Federal statute and their own regulations. Judicial resolution of the military's determinations as to the propriety of the Complaint's investigation and the merits of Petitioner's allegations, would hardly involve "the court . . . in an appropriate degree of supervision over primary military activities."

The District of Columbia court has recently noted that, "'while the District of Columbia Circuit has not rejected the *Mindes* test by name, it has rejected the notion that a court should conduct a preliminary screening of military cases to determine which are appropriate for judicial review.'" *Benvenuti v. Department of Defense*, 587 F.Supp. 348, 354 n. 6 (D.D.C. 1984), *quoting* Note, *Judicial Review of Constitutional Claims Against the Military*, 84 Col L. Rev. 387, 403 (1984) (citing *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979), and *Knehans v. Alexander*, 566 F.2d 312 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 995 (1978)). In *Dilley v. Alexander*, *supra*, after reviewing *Orloff v. Willoughby*, *supra*, and its progeny, the court noted the "special circumstances in which the military must operate" and the amount of discretion to be allowed the military when "needed to establish and maintain a well-trained and well-disciplined armed force." 603 F.2d at 920 (citation omitted). However, the *Dilley* court went on to hold what should, by now, be plainly understood by all Federal courts when reviewing government agency decisions not specifically disallowed by act of the Congress:

> This logic is wholly inappropriate, however, when a case presents an issue that is amenable to judicial resolution. Specifically, courts have shown no hesitation to review cases in which a violation of the Constitution, statutes, or regulations is alleged. . . . It is a basic tenet of our legal system that a government agency is not at liberty to ignore its own laws and that agency action in contravention of applicable statutes and regulations is unlawful. . . . *The military departments enjoy no immunity from this proscription.* . . . It is the duty of the federal court to inquire whether an action of a military agency conforms to the law, or is instead arbitrary, capricious, or contrary to

> conforms to the law, or is instead arbitrary, capricious, or contrary to statutes and regulations governing that agency. . . . The logic [of this] . . . derives from the self-evident proposition that the Government must obey its own laws. 603 F.2d at 920 (citations omitted). (emphasis added)

Neither the special circumstances of military life, nor training or discipline, would have been in any way affected had the courts below reviewed Petitioner's claims on the merits. To the contrary, review and a ruling in the Petitioner's favor, as to command influence, sex discrimination and the substance of his Article 138 Complaint, could only have served to enhance the military society by showing the lower ranks that even colonels can, and when appropriate should, be disciplined. The type of test formulated by *Dillard*, *Dilley* and *Owens*, was recently reaffirmed in *Jorden v. National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986). As noted by a recent commentator, "*Dillard* . . . [is a] superior approach to Mindes" and the *Dillard*-type test should be adopted by this Court. *Jorden*, *supra*, 799 F.2d at 111 n. 16, *citing* Note, *supra*, 84 Col. L. Rev. 387, 403 420 n. 189-190, 423-434 (1984).

In *Jorden*, *supra*, the court applied the *Dillard* analysis and succinctly stated why applying a test like that in *Mindes* is not only too restrictive, but historically incorrect:

> ['[S]uits against the military are non-cognizable in federal court only in the rare case where finding for the plaintiff "require[s] a court to run the military. . . ."' Absent such an extreme case, "if the military justification outweights the infringement of the plaintiff's individual freedom, we may hold for the military *on the merits*, but we will not find the claim to be non-justiciable . . ." (court's emphasis).']" *Jorden*, *supra*, 799 F.2d at 111 *quoting Dillard*, *supra*, 652 F.2d at 322-324. Thus, instead of a complicated test such as that found in *Mindes*, the only question a Federal court should inquire of is whether it would end up having to "run the military" should it review a case on the merits.

III

WHERE, IN THE COURSE OF INVESTIGATING PETITIONER'S ARTICLE 138 COMPLAINT, THE MARINE CORPS UNCOVERED OTHER ALLEGATIONS OF WRONGDOING BY HIS SUPERIOR COMMANDING OFFICER, THE PETITIONER HAD STANDING, PURSUANT TO ARTICLE 138, AND 10 U.S.C. SECTION 5947 (1982), TO VINDICATE HIS OWN RIGHTS AS WELL AS THE RIGHTS OF OTHER MARINES

Captain Van Drasek filed an Article 138 Complaint. Captain Van Drasek followed all the procedures provided by Ch. 11, NAVREGS, paragraph 1106, in making his complaint on behalf of other Marines, and submitted this written report as a part of his Article 138 Complaint presenting the wrongs Colonel Cooper did to him personally.

Article 138 of the UCMJ, 10 U.S.C. Section 938 provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Captain Van Drasek clearly used the correct procedure to present the wrongs done to him by a superior officer.

The Navy, by its regulations, requires all "persons in the Department of the Navy [to] report to proper authority offenses committed by persons in the Department of the Navy which come under (their) observation." *Paragraph 1139, NAVREGS (1973).* In addition, 10 U.S.C. Section 5947 (1982), codified by the Navy at paragraph 1102, NAVREGS (1973), orders all officers "in authority" . . . *to guard against and suppress all dissolute and immoral practices and to correct . . . all persons who are guilty of them"* (emphasis added). Ch. 11, NAVREGS, paragraphs 1101-1106, 1109 and 1139, allow Captain Van Drasek to submit a complaint on behalf of pregnant Marines, of oppressed members of Administrative Discharge Boards, and of any persons dissuaded from testifying on behalf of another due to the command influence exercised by Colonel Cooper. *(See* App. pp. 12-16.)

Since all Naval Regulations, and particularly the NAVREGS, have "the sanction of law," *paragraph 1201, NAVREGS (1973), Ex Parte Reed,* 100 U.S. 13 (1879), military administrative decisions or actions which result in violations such as those alleged by Captain Van Drasek are reviewable, and Captain Van Drasek has standing to complain.

IV

THE ADMINISTRATIVE PROCEDURES ACT, 5 U.S.C. SECTIONS 551 *et seq.* (1982), DOES NOT PRECLUDE JUDICIAL REVIEW OF MILITARY ADMINISTRATIVE DECISIONS

The courts below were in error when they ruled that the APA, specifically 5 U.S.C. Section 701(b)(1)(F) (1982), precluded judicial review of Petitioner's Article 138 Complaint. That section applies only to "courts-martial and military commissions," and is, thus, totally inapplicable to the instant case. An Article 138 Complaint investigation, and decisions of the BCNR, are not covered by the quoted language in 5 U.S.C. Section 701(b)(1)(F) (1982).

The APA allows judicial review of agencies, meaning "each authority of the Government of the United States." *5 U.S.C. Section 701(a).* Further, the APA provides that an "agency" subject to judicial review does not include "court-martial and military commissions." *5 U.S.C. 701(b)(1)(F).* Article 138, 10 U.S.C. Section 938 (1982), as implemented by Ch. XI, *Manual of the Judge Advocate General,* Sections 1101-1114, does not provide for a formal court-martial to be convened, nor does it anywhere mention "military commission." While a "court of inquiry" or "board of officers" might arguably be reckoned a "military commission," they are, in fact, mere advisory boards. Whichever course the officer exercising general court-martial

jurisdiction originally takes, he must "arrange to be advised of the results of the consideration of the complaint" by such bodies, and upon receipt of such advice, "shall complete his consideration of the complaint in light thereof, and shall proceed" to forward the complaint for redress by proper authority. *JAG-MAN Section 1104(a).* Thus, it is this officer who retains primary jurisdiction to act upon the complaint, not the "court of inquiry" or the "board of officers," and the individual could not properly be deemed a "military commission" or "court-martial." Further, both "court-martial" and "military commission" refer to very specific military bodies.

The Supreme Court accepted Colonel William Winthrop's distinctions in *Madsen v. Kinsella,* 343 U.S. 341, 345-347, n.9 (1982):

> The *Occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offices [sic] defined in a written code. It does not extend to many criminal acts especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required.... Hence, in our military law, the distinctive name of *military commission* has been adopted for the exclusively war-court . . . (emphasis in original) (Citing Winthrop, *Military Law and Precedent* (2nd Ed. 1920) at p. 831).

By explicitly excluding some military administrative bodies from judicial review, the language of the Act implies that other military administrative bodies' decisions will be judicially reviewable. The APA only explicitly excludes decisions and proceedings of the above bodies, and decisions made by "military authority exercised in the field in time of war or in occupied territory," from review. *5 U.S.C. Section 701(b)(1)(G).* It does not exclude any other military decision from review; the APA does not exclude Article 138 proceedings from judicial review.

V

10 U.S.C. SECTION 1552(a) (1982) CONFERS UPON THE BOARDS FOR CORRECTION OF MILITARY RECORDS JURISDICTION TO REVIEW INVESTIGATIONS OF ARTICLE 138 COMPLAINTS FOR PROCEDURAL AND SUBSTANTIVE CORRECTIONS

The lack of meaningful review of Petitioner's Article 138 Complaint outside his chain-of-command and the uniformed military is underscored by the BCNR's abdication of its statutorily mandated responsibility under Federal law: "The Secretary of a military department . . . acting through boards of civilian . . ., may correct *any* military record of that department when he considers it necessary to correct an error or remove an injustice." *10 U.S.C. Section 1552(a) (1982).* (emphasis added). In the instant case, the BCNR refused to review Petitioner's Article 138 Complaint either procedurely or substantively. SCJA at pp. 18-20. The BCNR ruled that the "record of proceedings under Article 138, UCMJ is not a matter properly before the Board. In that regard, the Board particularly notes that this record of proceedings does not appear in Petitioner's military personnel record. . . . The Board adopts the position stated by the attorney-advisor assigned to this case (see transcript of oral hearing, enclosure 3, pp. 6 and 7)." *SCJA at p. 18.* The BCNR took the position, noted above, that because the Article 138 proceedings weren't in Petitioner's official record, they were not "any military record" within the meaning of 10 U.S.C. Section 1552(a) (1982). This position flies in the face of both logic and the plain meaning of the language in the statute. The word "any" has one simple meaning that any rational person should have no problem understanding.

It is well settled that it is generally assumed that Congress expresses its purpose through the ordinary meaning of the words it uses. *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians,* 466 U.S. 765 (1984); [*In re Canadian Pacific Ltd.,* 754 F.2d 992 (Fed. Cir. 1985);] *National Ass'n of Broadcasters v. F.C.C.,* 740 F.2d 1190 (D.C. Cir. 1984); *Block v. Smith,* 583 F.Supp. 1288 (D.D.C. 1984), *affirmed in part, reversed in part,* 793 F.2d 1303 (D.C. Cir. 1986), *cert. denied,* 106 S.Ct. 3335 (1986). Moreover, in determining the scope of a Federal statute, the court looks first to its language and, if that language is unam-

biguous, in the absence of a clearly expressed legislative intent to the contrary, the language must ordinarily be regarded as conclusive. North Dakota v. United States, 460 U.S. 300 (1983); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *United States v. Turkette*, 452 U.S. 576 (1981). Finally, although an agency's interpretation of a statute under which it operates is entitled to some deference, such deference is constrained by the Federal Courts' obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In cases of constitutional interpretation, the customary deference granted to an agency's own interpretation of its own regulations or governing statutes is inappropriate. *Salvail v. Nashua Board of Education*, 469 F.Supp. 1269 (D.N.H. 1979). Thus, because the Respondents have totally failed to demonstrate that Congress' intent in use of the words "any military record" meant only official personnel records, the courts below, and the BCNR, were bound to apply the words in 10 U.S.C. Section 1552(a) (1982) according to their plain meaning. *U.S. Lines, Inc. v. Baldridge*, 667 F.2d 940 (D.C. Cir. 1982). At a minimum, this Court should remand this case to the District Court with an order that the BCNR review the Article 138 Complaint investigation for procedural and substantive correctness. In this regard, it is well-settled in the lower courts that "the BCNR is empowered to redress claims of Constitutional violations as well as the more routine inquiries into intro-military conflicts . . ." (citation omitted). *Ayala v. United States*, 624 F.Supp. 259 (S.D.N.Y. 1985). *Accord, Williams v. Secretary of the Navy*, 787 F.2d 552, 559 (Fed. Cir. 1986); *Baxter v. Claytor* 652 F.2d 181, 185 n.3 (D.C. Cir. 1981); *Neal v. Secretary of the Navy*, 639 F.2d 1029, 1042-1044 (3d Cir. 1981); *Bard v. Seamans*, 507 F.2d 765 (10th Cir. 1974); *Benvenuti v. Department of Defense*, 587 F.Supp. 348, 355-356 (D.D.C. 1984). Thus, the BCNR was clearly in error when they ruled that they had no power to review Petitioner's claims of procedural and substantive Constitutional violations during the Article 138 Complaint investigation.

CONCLUSION

The judgment of the United States Court of Appeals for the Federal Circuit, insofar as it affirmed the unpublished decision of the United States District Court for the District of Columbia, dismissing the Petitioner's complaint for lack of subject matter jurisdiction, should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to Charles Fried, Solicitor General, Department of Justice, Washington, D.C. 20530, this 3rd day of February, 1987.

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